

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



# 74-2293 <sup>b</sup>

To be argued by  
SHEILA GINSBERG

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*0700*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES G. MARTIN,

Appellant.

Docket No. 74-2293

Docket No. 74-2524

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REPLY BRIEF FOR APPELLANT

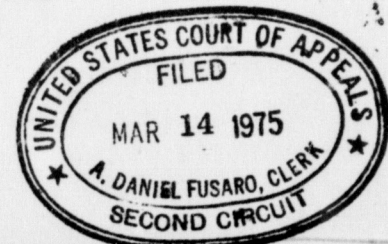
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ON CONSOLIDATED APPEALS FROM AN  
ORDER AND JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK

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ON APPEAL FROM AN ORDER AND JUDGMENT OF  
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The Government (Br. at 16-20), relying on inapposite authority, seeks to mislead this Court into acceptance of the theory that inadequate, erroneous supplemental instructions given in response to specific jury questions can be rendered harmless or made whole by reference to the main jury charge. Ignored by the Government is the fact that even if, from the perspective of appellate review, the main charge had been sufficiently clear, that the jury needed further elaboration demonstrates clearly



that for them the main charge did not answer their question. Bollenbach v. United States, 326 U.S. 607, 612 (1946).

In this case, on the second day of deliberations,\* after what the Government asserts was the definitive jury instruction, the jury returned with a single note asking two questions in tandem:

- (1) What is the definition of taxable income?
- (2) As a matter of law, does the Government have to prove Mr. Martin made personal use of embezzlement proceeds to show unreported taxable income?

As the Government concedes in its brief at 16, this case was one that essentially turned on the jury's determination of whether appellant used the money from the checks he cashed to pay St. Agnes' bills or his own. Therefore, the plain meaning of these questions, in the context of this case, is that the jury needed guidance to determine when money, concededly in the hands of the taxpayer, becomes "his" for purposes of tax liability. Toward that end the jurors had perceptibly asked whether it was part of the Government's case to prove "personal use" of the funds. The simple and accurate answer to this question was necessarily "yes." Economic benefit accruing to the taxpayer is the essential criterion for determining liability. United States v. Rutkin, 343 U.S. 130, 137 (1952); United

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\*Deliberations were begun in the afternoon of the preceding day.

States v. Rochelle, 384 F.2d 748, 451 (5th Cir. 1967). The failure to make this criterion clear to the jury (and, in fact, to obscure it) is reversible error. Without this explanation, the jurors might well have concluded that even if appellant cashed the unrecorded checks for the benefit of St. Agnes Home, he was nonetheless guilty because at some point he "personally" had the money in his hands.\* No part of the instructions mitigated against the jury's reaching this erroneous conclusion.

Unresponsive to the jury's inquiry, and irrelevant to the case as a whole, was the tautology employed by the Judge to "define" taxable income: Income is "income after exemptions and deductions upon which the tax rate is applied."

After the complete failure to elucidate the meaning of income for the purposes of this case, the Judge went on to tell the jury that all the Government needed to prove was that the funds from the checks were income to appellant. In this context the gratuitous addendum (not asked for by the jury) that the Government need not show how appellant spent the money after it became his "income" was clearly conducive to the conclusion that it was irrelevant to the question of guilt or innocence that the funds were used to help St. Agnes.

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\*This was, in fact, the way the prosecutor, despite his present position on appeal, had interpreted the thrust of the jury's inquiry and the evidence in this case. He argued that the Judge, in response to the jury's questions, should direct that appellant was guilty even if he had used all the proceeds of the checks to pay the institution's debts (Tr. 604-606).



This was fatal. Certainly the way appellant spent the money is relevant to the critical determination. Whether appellant had spent the money to pay the bills of the home was, on these facts, dispositive evidence of whether he made the funds his income.

The Government indulges in pure speculation when it seeks to infer from the use of the word "embezzlement" in the note that the jury had already decided that appellant had appropriated the funds to his own use and that therefore their question must be interpreted to mean only "Does the Government have to prove how appellant spent the money after it became his?" The situation was that Judge Owen never defined "embezzlement" -- in fact, he told the jury specifically that the case was not about embezzlement (Tr. 574). Thus, the jury's use of the word could only refer to the conceded manipulation of the funds.

Because the supplemental instruction was the last word the jury received on an issue critical to the case, the Judge was under a duty to take special care in his response.

When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be "quite cursory" in the circumstances in which the jury has asked for supplemental instructions.

Bollenbach v. United States,  
supra, 326 U.S. at 613.

The failure to answer the jury's questions on these facts mandates reversal of the conviction.

CONCLUSION

For the above-stated reasons and the reasons set forth in appellant's main brief, the conviction for criminal contempt should be reversed and the charge dismissed; alternatively, the six-month sentence should be reduced. The conviction for tax evasion should be reversed and the case remanded for a new trial.

Respectfully submitted,

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March 14, 1975



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March 14, 1975

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